STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2007
v	No. 272821 Wayne Circuit Court
JOHN CHARLES RAYSHAWN SMITH, Defendant-Appellant.	LC No. 06-004284-01

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b), and arson of a dwelling house, MCL 750.72. The trial court subsequently vacated the arson conviction and sentenced defendant to two concurrent terms of life imprisonment for the felony-murder convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arise from a fire at a two-story, four-unit apartment building in Detroit. The fire occurred in the middle of the night and an elderly couple who lived in an upstairs unit were killed in the fire.

Defendant first argues that there was insufficient evidence to prove that the fire was caused by arson. We disagree.

In reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000).

A person who willfully and maliciously burns a dwelling house is guilty of arson. MCL 750.72. At defendant's trial, the trial court applied CJI2d 31.1, which provides, in pertinent part, that "when there is a fire, the law assumes that it had natural or accidental causes. The prosecutor must overcome this assumption and prove beyond a reasonable doubt that the fire was intentionally set." But as our Supreme Court explained in *People v Nowack*, 462 Mich 392, 402; 614 NW2d 78 (2000):

> In arson cases, the trier of fact usually draws inferences from circumstantial evidence:

> "There is rarely direct evidence of the actual lighting of a fire by an arsonist; rather, the evidence of arson is usually circumstantial. Such evidence is often of a negative character; that is, the criminal agency is shown by the absence of circumstances, conditions, and surroundings indicating that the fire resulted from an accidental cause." [*Id.*, quoting *Fox v State*, 179 Ind App 267, 277; 384 NE2d 1159 (1979.]

In this case, Winston Farrow, a police arson investigator, testified that he personally investigated the fire scene and found two locations of origin, in two separate areas of the basement. He found a low burning pattern in the north central area of the basement, which was consistent with the use of a flammable liquid accelerant. He also observed an area on the east wall, where mattresses and furniture were consumed by the fire. He was able to smell accelerants in both places, most strongly from the north central area of the basement, where he found a rag with odor of an accelerant comparable to gasoline. Farrow also testified that he investigated other possible sources of ignition, such as the furnace and electrical items in the house, but eliminated those sources as a possible cause of the fire. Farrow concluded that the fire "was incendiary in nature," which meant that it was deliberately set using an open flame device with a flammable liquid accelerant.

We disagree with defendant's claim that Farrow's testimony must be disregarded because it violated MRE 703. Because defendant did not object to Farrow's testimony at trial, he must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). As defendant observes, MRE 703 requires that "[t]he facts or data . . . upon which an expert bases an opinion or inference shall be in evidence." Farrow relied on facts he personally observed during his investigation of the fire and he testified regarding those facts at trial. Although defendant asserts that the accelerant-soaked rag that Farrow allegedly observed was never produced at trial, Farrow testified that he detected an odor of accelerant "comparable to gasoline" when he examined the rag. Additionally, the rag was analyzed by the state police laboratory and tested positive for gasoline, and the laboratory report was admitted into evidence at trial without objection. Because the facts or data on which Farrow based his opinion were in evidence, his testimony did not violate MRE 703. There was no plain error.

Viewed in a light most favorable to the prosecution, Farrow's testimony was sufficient to enable the trial court to find beyond a reasonable doubt that the fire did not result from natural or accidental causes, but rather, was intentionally and willfully set.

Defendant also argues that even if there was sufficient evidence that he started the fire, the evidence was insufficient to show that he acted with the requisite malice to support a conviction for first-degree felony murder. The elements of felony murder include (1) the killing of a human being, (2) "with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e. malice]," (3) during the commission or attempted commission of an enumerated felony, including arson. *Nowack, supra* at 401.

The facts and circumstances of a killing may give rise to an inference of malice, and a jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *Id.* In this case, there was evidence that defendant intentionally set fire to a residential apartment building in the middle of the night, knowing that

there were other tenants, including the elderly victims, in the building. From this evidence a rational trier of fact could reasonably find that defendant intentionally set in motion a force likely to cause death or great bodily harm. Thus, there was sufficient evidence of malice to support defendant's felony-murder conviction.

Next, defendant argues that his due process rights were violated because his defense expert was not appointed until approximately a year after the fire occurred and, therefore, was not able to gain the information necessary to form an opinion regarding the possible origin and cause of the fire. Because defendant did not allege a due process violation in the trial court, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

In support of his due process argument, defendant relies on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), in which the Supreme Court held that it is a violation of due process for the prosecution to suppress material evidence favorable to the accused. Defendant argues that the principles in *Brady* require the conclusion that an inability of a defense expert to gain information necessary to form an opinion likewise constitutes a violation of due process. Here, however, defendant does not claim, nor does the record indicate, that any information was suppressed from the defense expert, that the defense expert was denied access to any information, or even that the defense expert was denied access to the burned building. Without such a showing, there is no basis for finding a *Brady*-based due process violation, and thus, no basis for finding plain error.

To the extent that defendant also presents an ineffective assistance of counsel argument in connection with this issue, because defendant did not raise the issue of ineffective assistance of counsel below, our review is limited to mistakes apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

According to the record, defense counsel indicated at trial that he "inherited" this case and began looking for an available expert witness, but had difficulty doing so. He did, however, find an expert who testified at defendant's trial and attempted to raise doubts about the prosecutor's evidence concerning the origin and cause of the fire. Although defendant faults defense counsel for not demanding that his expert have meaningful access to the premises, there is no indication in the record what demands, if any, counsel may have made regarding access to the premises. Furthermore, as indicated previously, there is no indication in the record that defendant's expert was denied access to any information. On this record, we find no basis for concluding that defense counsel was ineffective.

Defendant also requests a remand for an evidentiary hearing to determine whether his due process rights were violated. To be entitled to a remand, however, it is incumbent on defendant to present an affidavit or other offer of proof regarding the facts to be established at an evidentiary hearing. See MCR 7.211(C)(1). Here, defendant does not identify any facts that he would propose to establish on remand and instead simply asserts that "the record is silent." Under the circumstances, defendant has not shown that a remand is warranted.

Defendant next argues that he was improperly convicted on the basis of hearsay. We disagree.

Hearsay is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801(c). Hearsay is not admissible except as provided by the rules of evidence. MRE 802. In this case, defendant's landlord testified regarding several complaints that he received from tenants regarding defendant's behavior. The trial court agreed to allow this testimony only to explain why the landlord subsequently took action against defendant and his mother and agreed not to consider the testimony for its truth.

Defendant now argues that although the trial court agreed not to consider the evidence for a hearsay purpose, it did exactly that because it expressly found that defendant was a problem tenant, referring to some of the incidents that were reported to the landlord. In addition to the tenants' reports to the landlord, however, several tenants testified regarding their own observations and experiences with defendant. The trial court's findings that defendant was a problem tenant, and that there were various incidents involving defendant, were independently supported by this nonhearsay testimony. Further, the landlord's testimony that there had been ten police runs to the apartments because of defendant did not involve an out-of-court statement and, therefore, was not hearsay.

To the extent that some hearsay testimony was considered, because it was cumulative of other nonhearsay evidence concerning the problems that defendant caused with other tenants, it is not more probable than not that the outcome of trial would have been different without the tainted evidence. Therefore, any error was harmless. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Lastly, defendant argues that his Sixth Amendment rights were violated by the admission of testimony from a jailhouse informant who defendant maintains elicited incriminating statements from defendant with the intent of reporting that information to the police. The United States Supreme Court has held that when "a defendant's Sixth Amendment right to counsel has attached, he is denied that right when federal agents 'deliberately elicit' incriminating statements from him in the absence of his lawyer." *Massiah v United States*, 377 US 201, 206; 84 S Ct 1199; 12 L Ed 2d 246 (1964). In this case, however, there is no evidence of government involvement in the solicitation of defendant's statements. Even if the informant elicited the statements with the intent of reporting the information to authorities for the purpose of obtaining favorable treatment, absent any claim or evidence of government involvement, defendant's Sixth Amendment rights were not violated. *Id.*; *Matteo v Superintendent, SCI Albion*, 171 F3d 877, 892 (CA 3, 1999). We therefore reject this claim of error.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter

I concur in result only.

/s/ Elizabeth L. Gleicher